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SHARES WITHOUT PAR VALUE¹

The par value of a share of stock is a faulty criterion of its actual or market value, a proposition which should be apparent to the most uninitiated. A share of stock, being merely an aliquot interest in a corporation, the value of the interest is subject to constant fluctuation. It varies in value with the prosperity or lack of prosperity of the business and is sensitive to broad economic changes. In spite, however, of the incapacity of any given par value to reflect at all times the actual or market value of the share, we have seen that par value performs at least two valuable functions: (1) as a measure of the stockholders' liability to the corporation and its creditors for unpaid assessments and (2) as a line of demarcation between corporate capital from which the directors can not declare dividends or make distributions, and corporate surplus which is liable to distribution in dividends or otherwise.

A third function frequently fulfilled by par value is to measure taxes of various kinds assessed by the state upon the corporation. Prior to the introduction of shares without par value, as there are still in many states, taxes such as initial capitalization fees, fees payable upon increase of capital stock, franchise taxes and the like, were assessed upon the basis of the par value of the shares, either authorized or outstanding. The removal of par value naturally gave rise to numerous questions in the administration or interpretation of such statutes, not only in the states permitting the organization of no par value corporations, but in states making no provision for the issuance of shares without par value.

From an examination of the existing decisions by the courts it would appear that the principles underlying these taxes in some cases need re-examination and restatement in the statutes.

PRIVILEGE VERSUS PROPERTY TAXES

In theory a privilege tax is a tax imposed upon some privilege which the corporation enjoys from the state. Being a

¹ An earlier installment of this article was published in *Kentucky Law Journal* (May, 1925), vol. XIII, 275-287.

privilege created and extended to the corporation by the state it may be lawfully taxed by the state. A clear example of a privilege or excise tax is the initial tax imposed by the state upon the privilege extended to corporations by the state of issuing shares of stock. Exact uniformity is not required in the operation of a privilege tax, but a privilege tax must have a reasonable relation to the value of the privilege taxed.²

A property tax, on the other hand, under most of the state constitutions, must operate with substantial equality upon property of the same classification.

Under the decisions, the line of distinction between privilege or excise taxes and property taxes is not subject to precise delimitation, but the court will consider each case separately according to the particular facts involved.³ A corporate franchise is a privilege extended by the state, but the determination of whether corporate franchise taxes are in effect, privilege or property taxes is complicated by the fact that such taxes are frequently imposed in lieu of a tax upon the property of the corporation located in the state.⁴

With these generalizations in mind, it may be seen that the degree of equality of operation required of a tax upon the privilege of issuing shares may differ from the degree of equality of operation required in particular cases of a tax upon a corporate franchise, calculated upon the amount of the authorized or issued shares, and, accordingly, the two kinds of tax, as they respect shares without par value, will be considered separately.

TAXES ASSESSED UPON THE PRIVILEGE OF ISSUING SHARES

Under the federal statutes,⁵ no taxes are imposed upon authorized but unissued shares without par value, but an issuance tax is imposed when such shares are actually issued, based upon the amount of the consideration received by the corporation for the shares. This tax is really a tax upon the exercise of the privilege of capitalization, instead of upon the authorized number of shares or the privilege of issuing shares, though

² *Airway Corporation v. Day*, (1924), 266 U. S. 71.

³ See discussions and Supreme Court cases cited in *Columbia Law Review* (March, 1925, vol. XXV, 333-337).

⁴ See *Postal Telegraph Cable Co. v. Adams* (1894), 155 U. S. 688.

⁵ Revenue Act of 1924, section 807, Sched. A (2).

the two privileges are inter-related, as capitalization can not be effected without the issuance of shares. The tax, being based upon the amount of capitalization effected, or the extent to which the privilege of capitalization is exercised, operates with equality and raises no constitutional questions.

Maine,⁶ Delaware⁷ and many other states which permit the issuance of shares without par value, on the other hand, impose a uniform tax per share on each share without par value authorized, payable at the time the certificate of incorporation or of increase of number of authorized shares is filed with the state officials, or what amounts to the same thing, provide that all shares without par value shall for tax purposes be equally valued at an amount per share which is arbitrarily fixed by the statute. The simplicity of the collection of such a tax commends it from the administrative viewpoint, and from a constitutional viewpoint it may be argued that what the state taxes is the privilege of having shares rather than the value received for the shares; and as all are taxed for the privilege of having shares, no inequality exists where the same tax is required for all shares.⁸ Actual inequality, however, obviously results in the operation of such a tax, as the consideration actually received for the issuance of the shares without par value may be greatly different from the arbitrary value fixed by the statute, and a corporation which issues 1,000 shares without par value for \$100 per share will pay the same tax as a corporation which issues the same number of shares for \$1 per share.

Since, however, as already seen, the decisions do not require uniformity in the operation of a privilege or excise tax, the constitutionality of this form of tax does not appear to have been questioned in the reported decisions. In two Massachusetts decisions, however, a judicial trend may be detected in favor of a tax based upon the capitalization effected or to be effected, as opposed to a tax based upon the authorized number of shares. A Massachusetts statute provided that upon an increase of the authorized capital stock, a corporation should pay to the state a fee amounting to 1/20 of 1 per cent of the

⁶ Maine P. L. (1921) ch. 224, as amended by P. L. (1925), ch. 196.

⁷ Dela. Corp. Law, sec. 4a.

⁸ See C. W. Wickersham "No Par Value Stock." Harvard Law Review (1924), vol. XXXVII, p. 473.

amount of stock with par value and five cents a share for all shares without par value "by which the capital is increased." Another statute provided that a corporation might be reorganized by converting its par value shares into an equal or greater number of shares without par value. A domestic corporation which had 50,000 common shares outstanding of the par value of \$100 per share was reorganized by converting the same into 100,000 shares without par value. The Secretary of State demanded and the corporation paid under protest, a fee upon the ground that the transaction constituted an increase of capital within the meaning of the statute. It was held that the fee was illegally exacted and that the corporation should be reimbursed. In *Hood Rubber Company v. Commonwealth*⁹ the court said:

"In the case at bar the number of shares has been increased. The capital stock remains the same; the number of fractions into which it is divided alone is increased. This is not the case where, after the change from stock with a par value to stock without par value there has been an increase in the corporate assets by the issuance of further stock without par value."

In *Olympia Theatres, Inc., v. Commonwealth*,¹⁰ decided upon the same day, a domestic corporation which had outstanding 80,000 shares of common stock of the par value of \$50 each, acting under the same statutes, converted the same into shares without par value and at the same meeting increased the number of its common shares from 80,000 to 250,000. Here the court held that the corporation must pay a tax of 5 cents a share on 170,000 shares.

The court in these holdings appears to have had in mind the analogy of the par value laws, where the tax is nearly always measured by the par value of the stock authorized, or, in other words, the amount of the capitalization authorized. The conversion of par value shares into shares without par value is but an exchange of certain muniments of title for other muniments of title without affecting the capitalization, or in the words of the court in the *Hood Rubber Company* case,¹¹ "in any particular affecting, altering or modifying the nature of the property owned by the corporation."

⁹ (1924), 238 Mass. 369, 373.

¹⁰ (1924), 238 Mass. 374.

¹¹ See also *Randle v. Winona Coal Co., et al.*, (Ala, 1921), 89 So. 790.

From these cases it would appear that only those shares should be taxed which represent or will represent an accretion of capital assets. It is further submitted that a tax such as the federal issuance tax, based upon the capital assets received for the issuance of shares without par value is more consistent with the policy of the par value laws, than a tax of the Maine or Delaware type, where the assessment is made without reference to the amount of capital assets received or to be received by the corporation for the issuance of the shares.

CORPORATE FRANCHISE TAXES

Franchise taxes, as distinguished from taxes assessed upon the privilege of issuing shares, are paid not once, but from time to time for each recurrent tax period. The tax burden continues as long as the corporation exercises in the state its corporate franchise and purposes.

In many states franchise taxes are based upon the amount of authorized or issued capital stock, and in some states an arbitrary value for such purposes is placed upon the authorized or issued shares without par value. The validity under constitutional requirements as to equality of taxation, of such a valuation of shares without par value, has arisen in several cases.

In a recent New York case, the court held unconstitutional a statute providing that every foreign corporation, doing business in the state, should be subject to a minimum franchise tax of one mill upon such portion of its "issued capital stock, at its face value," as its gross assets employed within the state bore to its gross assets wherever employed, and "if such a corporation has stock without par value, then the tax shall be such a portion of its issued capital stock as its gross assets employed in its business in the state bear to the entire gross assets employed in its business; and its shares without face value shall be deemed to have a face value of \$100, for purposes of this assessment," pointing out that the arbitrary value placed upon the issued no par value shares might result in a corporation employing within the state a capital of only \$1,000, paying for the privilege of doing such limited business, the same franchise tax as a corporation employing within the state a capital of \$200,000.¹²

¹² *People, ex. rel, T. & T. Taxi Corp. v. Walsh* (N. Y., 3rd Dept., 1922). 202 App. Div. 651.

In spite of the evident soundness of this holding, later decisions in Illinois,¹³ Texas,¹⁴ and Michigan¹⁵ which, however, arose under somewhat different statutes, have upheld franchise taxes, based, with respect to shares without par value, upon an arbitrary value per share.

Both the Illinois and Texas cases involved a tax based upon authorized rather than issued capital, and show the practical difficulties and inequality of such a tax basis as applied to no par value shares. The Illinois statute required all domestic corporations and foreign corporations admitted to do business within the state to pay an annual franchise tax of five cents on each \$100 of the proportion of their authorized capital stock, "represented by business transacted and property located" in the state, no par value shares to be considered for the purpose of the statute "to be of the par value of \$100 per share." The court which distinguished the *Walsh* case on the ground that the New York statute was based upon issued capital rather than upon authorized capital appears to have been unduly influenced by the difficulty under the Illinois statute of fixing any but an arbitrary value on the authorized but unissued no par value shares. The court said:

"The issue presented in this case, therefore, comes down to this: The General Assembly cannot, under the law as it now stands, effectively levy an annual license or franchise tax upon corporations having no par value stock unless it has authority to prescribe a definite value for such stock, for the purpose of computing a franchise tax. The General Assembly must either require the corporation to place a definite and specific value upon all stock, or it must have authority to fix such a value for the purpose of computing the tax on no par value stock, if it is to retain the power to levy an annual franchise tax based upon the authorized capital stock of the corporation. To require the corporation to place a specific value, in advance, on all stock is to abolish no par value stock."¹⁶

An adequate answer to this is that the net assets of a corporation, and in the case of a foreign corporation, the propor-

¹³ *Roberts & Schaeffer Co. v. Emmerson* (1924), 313 Ill. 137, 144 N. E. 818.

¹⁴ *American Refining Co. v. Staples*, (Civ. App., Texas, 1924), 260 S. W. 614.

¹⁵ *Detroit Mortgage Corp. v. Vaughn* (1920), 211 Mich. 320, 178 N. W. 697.

¹⁶ *Roberts & Schaeffer Co. v. Emmerson*, *supra*, 313 Ill., at pages 146, 147.

tion of the net assets employed within the state to the entire net assets of the corporation, wherever situated, are a proper basis for the imposition of franchise taxes upon no par value corporations, and a basis which does not raise the constitutional questions with which the court in this case was troubled.

The opinion of the dissenting judge holding the arbitrary basis of the tax void under a provision in the Illinois Constitution requiring the taxation of corporations "owning and using franchises and privileges" to be "uniform as to the class upon which it operates" is based upon the position that the classification of corporations should be with respect to essential characteristics, such as distinguish ordinary business corporations, corporations for mining, banking, insurance and the like, rather than with respect to a difference in their internal economies such as whether their shares are with or without par value. On the basis of the latter classification the Illinois tax, assuming that the arbitrary value fixed for no par value shares is in excess of the actual issuance value, discriminates in favor of par value corporations as against no par value corporations; and assuming that the arbitrary value is different from the actual issuance value, as is usually the case, as between individual no par value corporations.

In *American Refining Company v. Staples*,¹⁷ the Texas law, which was concededly passed with particular reference to par value foreign corporations, provided for a graduated tax based upon that proportion of "the authorized capital stock, plus the surplus and undivided profits" of foreign corporation, which the "gross receipts from the Texas business of such corporation done within the state of Texas bears to the total gross receipts of such corporation from its business." Unlike the statutes in New York and Illinois no valuation for tax purposes was placed upon authorized but unissued shares without par value. In the dilemma presented by the statute, the court resorted to bold judicial legislation and held that such shares must be taxed at the average value received for the issuance of the outstanding shares without par value. As the corporation at bar had issued but half its authorized shares, all of which were without par value, the tax assessed upon its fran-

¹⁷ *Supra*, note 14.

chise amounted to double the tax payable upon the franchise of a corporation employing in the state the same amount of capital but having only half as many authorized shares. That the authorized but unissued shares might ultimately be issued for a different price than the arbitrary value set upon them by the court, does not appear to have been considered by the court in its decision. Nor does the court appear to have considered that in taking par value as the basis of the tax for par value shares, and an arbitrary value as the basis of the tax for shares without par value, tax discrimination might occur in favor of corporations having par value stock; nor that tax discrimination might readily occur between different no par value corporations, as for instance, where one no par value corporation issues its remaining authorized shares for a price equivalent to the arbitrary value set by the court as the tax basis, and another no par value corporation issues its authorized but hitherto unissued shares for a price less than such arbitrary value.

The difficulties with which the courts have struggled in applying franchise taxes upon the basis of the authorized number of shares without par value are further illustrated in *Detroit Mortgage Corporation v. Vaughan*,¹⁸ which arose under a statute providing that a corporation "in case such corporation has at the time of its application for admission carried on business at least six months outside of Michigan, . . . shall pay a franchise fee on its entire authorized capital stock. . . ." The corporation on which this tax was to be imposed had been incorporated in Delaware with preferred stock and with 250,000 shares of common stock of the par value of \$10 per share. All of its assets and all of its business was located in the state of Michigan. Subsequent to its incorporation, through corporate action provided in the Delaware laws, the corporation was reorganized by the conversion of its common stock into shares without par value. There was no accretion of capital assets and as in the *Hood Rubber Company* case the reorganization consisted merely in the exchange of the certificates for common stock of a stated par value for certificates without par

¹⁸ Supra, Note 15.

value. The court, however, in sanctioning a tax on the common shares ten times as great as the corporation would have had to pay previous to the reorganization, held that in the absence of anything in the Michigan statutes indicating what value should be fixed for the authorized shares without par value, such value should be determined by a reference to the laws of Delaware, the state of incorporation, and particularly to a Delaware statute providing: "For the purpose of the taxes prescribed to be paid on the filing of any certificate or other paper relating to corporations and to franchise taxes prescribed to be paid by corporations *to this state*, and for no other purpose, such shares '(without par value)' shall be taken to be of the par value of \$100 each" (italics ours). If for no other reason, the soundness of this decision may be criticized on the ground that the arbitrary value fixed by Delaware for local taxation "and for no other purpose," was not intended as a valuation for purposes of taxation in Michigan.¹⁹

¹⁹ This criticism is made in *Staples v. Kirby Petroleum Co.* (Civ. App., Texas, 1923), 250 S. W. 293, at page 296: "It (the Delaware statute) relates only to the question of taxation, a matter in which the state of Delaware has no interest in other states. For this reason alone it must be presumed that it was not intended to have extraterritorial force. . . . There is another reason why the law of the state granting the charter should not be applied in this state, in so far as it fixes the value of non-par shares for taxing purposes in such state. Delaware fixes such shares at \$100.00 each. Suppose New York should fix such value for such purpose at \$50.00, and New Jersey would fix the same at \$10.00, the result of enforcing such laws in this state would be that, instead of corporations paying in proportion to their capital stock as is contemplated by our statute, different corporations, chartered under the laws of different states, would be taxed unequally, contrary to the letter and spirit of the Constitution and laws of this state."

In connection with these cases we shall reserve for the time being certain questions which arise under the Federal Constitution.

ADMISSION AND TAXATION OF FOREIGN CORPORATIONS HAVING SHARES WITHOUT PAR VALUE, IN STATES WHICH DO NOT PROVIDE FOR THE ISSUANCE OF SHARES WITHOUT PAR VALUE.

Can a state which does not provide for no par value corporations refuse admission to such corporations when incor-

porated under the laws of a foreign state? If not, the same questions with respect to the taxation of foreign no par value corporations arise, as in the states where provision for shares without par value is made in the laws.

Writers in the *American Law Review* in 1921 state that at that time the administrative offices of at least six states were then refusing admission to foreign no par value corporations.²⁰ Montana has enacted by statute that it shall be illegal for no par value corporation to do business within the state.²¹

The only cases on the subject have occurred in Kansas²² and Missouri²³ before the enactment in those states of laws permitting local corporations to issue shares without par value. In Missouri the power of the Secretary of State to admit foreign no par value corporations was particularly questioned because of a local statute which provided that in the event it appeared that foreign corporations "could not organize under the laws of Missouri" a license to do business in the state would be refused. In spite of this statute the Missouri Supreme Court held that, on broad principles of comity between the states, foreign no par value corporations must be admitted in Missouri. The reasoning of the court is persuasive. The authorities generally have held that, on the grounds of comity between the states, a foreign corporation cannot be kept out of a state because it is organized to carry on a business for which a domestic corporation cannot be created. There would seem to be less reason for excluding a foreign corporation because of some difference in its internal economy. In the words of the court:

"The form of a company's capital stock is plainly less material in its bearing on public business than the company's business; and less persuasive arguments can be advanced for excluding a company from a state because of the nature of its stock than because of the nature of its business, unless the stock is so formed as to be fraudulent or to promote fraud."²⁴

²⁰ *Harno and Rice*, "No Par Value Stock," 56 *American Law Review* 321.

²¹ *Laws of Montana* (1923) ch. 132.

²² *North American Petroleum Co. v. Hopkins* (1919), 105 Kan. 161, 181 Pac. 625.

²³ *State ex rel. Standard Tank Car Co. v. Sullivan* (1920), 282 Mo. 261, 221 S. W. 728.

²⁴ *State ex rel. Standard Tank Car Co. v. Sullivan*, *supra*, 282 Mo. at page 277.

A similar result had previously been reached in Kansas. These cases appear to be sound. As pointed out in the Missouri case the various states differ widely in their regulations concerning the internal economy of domestic corporations. Texas, for instance, requires all of the authorized capital stock of certain domestic corporations to be subscribed and 50 per cent thereof to be paid in prior to incorporation;²⁵ Wisconsin requires half of the authorized capital stock to be subscribed and at least 20 per cent thereof to be paid in before beginning business;²⁶ Ohio 10 per cent to be paid in before the first election of directors.²⁷ If each of these states should discriminate against foreign corporations with a different internal economy, Texas might exclude Wisconsin and Ohio corporations unless all of the authorized capital stock was subscribed and 50 per cent paid in at the time of the application to do business in Texas; while Wisconsin might exclude all Ohio corporations unless at the time of the application to do business in Wisconsin half of the authorized stock was then subscribed and at least 20 per cent thereof paid in.

In view of the fact that since 1921 many states have enacted no par value laws—there are such laws in at least 35 states²⁸—it may be doubted whether a contrary view, excluding foreign no par value corporations, would receive serious consideration in the courts at the present time.

The existing tax laws in Missouri and Kansas, at the time of the *North American Petroleum Company*²⁹ and *Standard Tank Car Company*³⁰ cases, were framed with respect to par value shares. In the *North American Petroleum Company* case the court held that under the Kansas statute, imposing an initial capitalization fee upon foreign corporations "based upon that proportion of its lawfully issued capital which it proposes to invest and use" within the state, such fee should be computed on that portion of its assets which the corporation proposes to invest and use within the state. As it appears from

²⁵ Complete Texas Statutes (1920), sections 1125-1128.

²⁶ Wisconsin Statutes (1921), section 1773.

²⁷ Ohio General Code, Ann. (1921), section 8635.

²⁸ See Kentucky Law Journal (May, 1925), vol. XIII, at page 275.

²⁹ Supra, note 22.

³⁰ Supra, note 23.

the language of the court that it had in mind total assets, including surplus and undistributed profits, rather than capital assets, it is submitted that this is the rather doubtful intentment of the statute in view of the phrase "lawfully issued capital." The rule of the Kansas court was followed in the *Standard Tank Car Company* case which involved a Missouri statute providing that "every corporation, whether organized under the laws of Missouri or not, engaged in business in Missouri, shall pay an annual franchise tax equal to three-fourths of one per cent of the *par value* of its outstanding *capital stock* and surplus employed" in Missouri (*italics ours*).

Unless the existing tax laws in the states which do not provide for the issuance by domestic corporations of shares without par value, are amended to cover adequately the computation of taxes based upon the shares without par value of foreign corporations which are admitted to do business in those states, the proper computation of such taxes must remain a matter of doubt and a source of litigation in the courts.³¹ It is needless to add that the remedy for the situation would appear to lie with the legislatures of such states rather than in the courts.

VALIDITY UNDER FEDERAL CONSTITUTION OF TAX UPON FRANCHISE OF FOREIGN CORPORATION BASED UPON SHARES WITHOUT PAR VALUE.

Under the decisions of the United States Supreme Court a property tax upon a foreign corporation must be levied on the property of the foreign corporation which can be allocated to the state.³² Franchise taxes, whether or not in effect, prop-

³¹ In this connection the Kentucky statute under which the franchise tax payable by foreign corporations, admitted to do business in the state, is computed upon their *authorized* capital stock, leaves in doubt how the tax is to be computed upon foreign corporations having authorized by unissued shares without par value: "Domestic and foreign corporations shall pay an annual license tax of fifty cents (50c) on each one thousand dollars (\$1,000.00) of that part of their authorized capital stock represented by property owned and business transacted in this state, which shall be ascertained by finding the proportion that the property and business transacted in this state bears to the aggregate amount of property owned and business transacted in and out of the state. . . ." Carroll's Kentucky Statutes (1922), section 4189c.

erty taxes, may likewise be unconstitutional if a burden upon interstate commerce.³³

A franchise tax based upon the total authorized capital stock of a corporation, without relation to whether its business is interstate or intrastate, is valid as a privilege or excise tax, if limited to a small maximum amount, such as \$2,000,³⁴ and this is true regardless of the fact that the statute may fix an arbitrary value for shares without par value.³⁵

Where, however, no such limit is fixed, a franchise tax will be considered with respect to its effect upon interstate commerce, and whether or not it is valid with relation to the provisions of the fourteenth amendment guaranteeing due process and "the equal protection of the laws." In a recent case, *Airway Corporation v. Day*,³⁶ the Supreme Court invalidated an Ohio statute which prescribed an annual franchise tax payable by each foreign corporation having common stock without par value of "five cents per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted in this state." As the *Airway Corporation* had issued only 1/8th of its authorized shares of common stock without par value, the tax which the tax authorities assessed upon it amounted to eight times the tax assessable upon another foreign corporation having the same amount of property in Ohio and the same number of issued and outstanding shares of common stock without par value. Only 28 per cent of its business was confined to Ohio and the balance was interstate. The court found that the "inevitable effect" of the act was "to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporations' property and business in the state."

³³ *Union Trust Co. v. Kentucky* (1905), 199 U. S. 194.

³⁴ This interesting subject is included in the discussion contained in *Columbia Law Review* (March, 1925), vol. XXV, 333-337.

³⁵ *Baltic Mining Co. v. Massachusetts* (1913), 231 U. S. 68.

³⁶ *American Uniform Co. v. Commonwealth* (1921), 237 Mass. 42, 129 N. E. 622.

³⁷ *Supra*, note 2.

The decision, holding that in addition, the statute denied to foreign corporations exercising their franchises in Ohio the equal protection of the laws, is apparently the latest judicial pronouncement with respect to the validity of a franchise tax based upon the authorized rather than the issued shares without par value of a foreign corporation:

"The number of non-par value shares of the corporation is not an indication of and does not purport to be a representation as to the amount of its capital. Each outstanding share represents merely an aliquot part of the assets. The number of shares not subscribed or issued has no relation to the privilege held by the plaintiff in Ohio, and it is not a reasonable measure of such a fee. Such shares may never be subscribed or issued, or additional shares may be issued to acquire property or do business in other states or to carry on interstate commerce. Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock or to its value or the amount of plaintiff's capital, its property or its business, intrastate in Ohio or interstate. The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. Unless, under the laws of the states where organized, they chance to be authorized to issue the same number of non-par shares, the annual franchise fees imposed on foreign corporations having the same amount of property and business, and exercising the same privileges in Ohio will not be the same; and the charge imposed on one may be many times that made against another . . . Again, compare two corporations organized in a sister state having the same number of authorized non-par value shares, one having property and business of little value, all in Ohio, and the other having much more property and business in that state, and also much property and business in other states. The act would require the former to pay five cents per share on all its shares, but would require the latter to pay a fee based only on the proportion of the shares representing property owned and used and business transacted in Ohio. . . .

This case does not necessarily overrule *Roberts & Schaeffer Co. v. Emerson*,³⁸ as no foreign corporation was there involved; but it is submitted that, regardless of whether or not the statute there involved is constitutional under the Illinois Constitution, the holding casts doubt on the constitutionality of the statute under the Federal Constitution. The authority of *American Refining Company v. Staples*³⁹ and *Detroit Mortgage Corporation v. Vaughan*⁴⁰ would also seem to have been rendered open to serious question.

"The act violates the equal protection clause of the Fourteenth Amendment."⁴¹

³⁷ *Airway Corporation v. Day*, *supra*, 226 U. S., at pages 83, 84, 85.

³⁸ *Supra*, note 13.

³⁹ *Supra*, note 14.

⁴⁰ *Supra*, note 15.

CONCLUSIONS

We have stated that the principles underlying taxation based upon shares without par value in some instances, need restatement in the law. The cases included in this article, and particularly *Airway Corporation v. Day* show the constitutional difficulties which arise where an arbitrary value is put upon such shares for franchise tax purposes, as is unavoidable if the tax is based upon authorized rather than issued shares. A distinction of doubtful utility in the development of the law affecting shares without par value, may be drawn where such shares are arbitrarily valued for the purpose of computing the initial tax assessed upon the privilege of issuing shares.

As stated by the Supreme Court authorized but issued shares without par value do not represent any capital assets.

The number of shares without par value likewise does not in any way indicate the amount of the corporation's capital, by which it would seem the value of its franchise should be estimated. Whether the tax be an initial tax upon the privilege of issuing shares, or an annual fee for the privilege of exercising the corporate franchise, practical equality in the taxation of the thing taxed, whether it be the use of the privilege or property, can be secured only by making the tax proportionate to the actual capital assets received as consideration for the issued shares. It is submitted that in order to avoid obvious practical inequalities of taxation, the statutes imposing taxes based upon a valuation of shares without par value, should be framed with this principle in mind. In the case of foreign corporations an equitable computation of taxes can be arrived at by taking the proportion which the net assets within the state bear to the net assets wherever situated. Unless in the states which have not passed laws with reference to shares without par value, laws are passed specifying the taxes payable by foreign corporations having shares without par value, admitted to do business in the state, there will remain a source of litigation necessitating judicial legislation, such as has occurred in Missouri and Kansas.

The argument that a tax based upon authorized rather than issued shares or upon authorized capital rather than actual capital, tends to prevent over-capitalization or the evil com-

monly known as "stock watering" is an obvious fallacy, as "stock watering" has no relation to the number of authorized shares or the amount of authorized capital, but results from the over-statement on the books of the corporation of the value of the capital assets actually received. In this sense, which is the only correct sense in which capital stock can be watered, the introduction of shares without par value does not reduce in any way the danger of watered stock which exists under laws permitting the issuance of shares with par value. It would appear that protection against "watered stock," in this sense, depends not upon whether a corporation issues shares with or without par value but upon the enactment and enforcement of adequate blue-sky laws, regulating the issuance and sale of new stock issues, irrespective of kind.

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